

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 75-95:

|                               |   |                              |
|-------------------------------|---|------------------------------|
| LABORERS' LOCAL NO. 254,      | ) |                              |
| Affiliated with the LABORERS' | ) |                              |
| INTERNATIONAL UNION OF NORTH  | ) |                              |
| AMERICA, AFL-CIO,             | ) |                              |
|                               | ) |                              |
| Complainant,                  | ) | <b>FINDINGS OF FACT;</b>     |
|                               | ) | <b>CONCLUSIONS OF LAW;</b>   |
| vs.                           | ) | <b>AND RECOMMENDED ORDER</b> |
|                               | ) |                              |
| STATE OF MONTANA, DEPARTMENT  | ) |                              |
| OF ADMINISTRATION, GENERAL    | ) |                              |
| SERVICES DIVISION,            | ) |                              |
|                               | ) |                              |
| Defendant.                    | ) |                              |

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**I. INTRODUCTION**

A formal hearing in the above-entitled matter was conducted on August 21, 1995, in Helena, Montana before Stan Gerke, Hearing Officer. The hearing was conducted under authority of Section 39-31-406, MCA, and in accordance with the Montana Administrative Procedures Act, Title 2, Chapter 4, Part 6, MCA. Complainant, Laborers' Local No. 254, Affiliated with the Laborers' International Union of North America, AFL-CIO, was represented by Karl Englund, Attorney at Law, Missoula, Montana. Present for Complainant during the morning portion of the hearing was Eugene Fenderson, Business Manager, Local Union No.

254. Present during the afternoon portion was Wayne Guccione, Mail Clerk, Central Mail Bureau, General Services Division, Department of Administration, and member of Local Union No. 254. Defendant, State of Montana, Department of Administration, General Services Division, was represented by Vivian Hammill, Legal Counsel, Labor and Employee Relations Bureau, State Personnel Division, Department of Administration. Present for Defendant were Kenneth McElroy, Labor Relations Specialist, Labor Relations and Employee Relations Bureau, State Personnel Division, Department of Administration, and Debra Fulton, Administrator, General Services Division, Department of Administration. Witnesses included Eugene Fenderson (referenced above); Kenneth McElroy (referenced above); Debra Fulton (referenced above); Mickey Street, Mail Clerk Supervisor, Department of Public Health and Human Services; Dennis McAlpin, John H. Morgan, and Terry Strum, Mail Clerks, Larry Higgins, Mail Clerk Floor Supervisor, and William T. Spurzem, Supervisor, all of the Central Mail Bureau, General Services Division, Department of Administration. Complainant's Exhibits Nos. A, B, C, and D and Defendant's Exhibits Nos. 1 through 10 and No. 14 were entered on the record. Pursuant to a post-hearing briefing schedule, the matter was fully submitted on October 2, 1995.

## **II. ISSUE<sup>1</sup>**

The issue in this matter will be to determine whether Defendant violated Section 39-31-401(1), (3), and (5), MCA. More specifically, the only factual issues in this matter are whether Mr. William T. Spurzem threatened mail room employees with the loss of their jobs if they participated in a strike and whether Mr. Spurzem threatened Mr. John H. Morgan by making a remark about a bullet-proof vest.

## **III. FINDINGS OF FACT<sup>2</sup>**

1. Complainant, Laborers' International Union of North America, Local No. 254, is the exclusive bargaining representative for non-supervisory employees employed by the Central Mail Bureau of the General Services Division of the

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<sup>1</sup>This Hearing Officer understands that Complainant's members ultimately are seeking to receive unemployment benefits for the time they were on strike. In order to secure unemployment benefits, Complainant must prove that Defendant failed or refused to conform to a State or Federal law and that non-compliance caused the strike. Section 39-51-2305(3), MCA, states:

If the Department, upon investigation, shall find that such labor dispute is caused by the failure or refusal of any employer to conform to provisions of any law of the state wherein the labor dispute occurs or of the United States pertaining to collective bargaining, hours, wages, or other conditions of work, such labor dispute shall not render the workers ineligible for benefits.

A determination on the unemployment issue is not before this Hearing Officer.

<sup>2</sup>All proposed findings, conclusions and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions, and views stated herein, they have been accepted, and to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions may have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

Department of Administration of the State of Montana  
(Defendant).

2. Complainant and Defendant have been parties to a series of collective bargaining agreements. In January 1995, Complainant and Defendant began collective bargaining for a new agreement to replace a two year agreement that expired on June 30, 1995. The chief negotiator for Complainant was its Business Agent, Eugene Fenderson. The chief negotiator for Defendant was Department of Administration Labor Relations Specialist, Kenneth McElroy.

3. Several issues were discussed during the course of collective bargaining, including a job bidding procedure, training programs, the scheduling of vacations, verbal abuse of Central Mail Bureau employees by Central Mail Bureau supervisors, and the establishment of a labor/management committee (Defendant's Exhibit No. 5). The most contentious issue was the issue of pay. Complainant wanted the employees to be placed on the blue collar classification system (Complainant's Exhibit No. D), whereas Defendant strongly resisted such a change.

4. The parties met on several occasions in January and February, 1995 (Defendant's Exhibit No. 5), but were unable to reach agreement. In mid-February 1995, Complainant's members

voted to authorize their Business Agent to call for a concerted work stoppage.

5. Complainant did not strike immediately after the strike vote. Instead, the fact of the strike vote was communicated to Defendant's negotiators for the purpose of demonstrating that the employees were willing to strike. Additionally, the strike vote was common knowledge in the Central Mail Bureau.

6. On April 24, 1995, Complainant's members began a work stoppage against Defendant. The strike lasted for about six weeks until a new contract was agreed to between the parties.

7. Privatization of the Central Mail Bureau has been a topic of discussion among the employees of the Central Mail Bureau since at least 1990. The State's mail system has been previously reviewed for the possibility of privatization. In the recent past, a Helena area business, Security Armored Express, placed a bid with then Governor Stan Stephens to privatize the State mail system. As recent as the 1995 Legislative session, members of a Legislative Committee toured the mail room as part of their privatization review of the State's mail system. Currently, Governor Racicot's administration has privatization on its agenda and has ordered all State agencies to review all provided services.

8. Debra Fulton is opposed to the privatization of the Central Mail Bureau. In her capacity as administrator, General Services Division, she has prepared reports and other documentation and testified before past Legislative standing committee(s) in opposition to the privatization of the Central Mail Bureau.

9. The privatization of the Central Mail Bureau has been and remains a real possibility.

10. Should the Central Mail Bureau be privatized, the real possibility exists that all employees, including the supervisors, would lose their positions as State employees.

11. Some employees believed that should the Central Mail Bureau be privatized, they may retain employment with the private sector employer and earn a higher wage equivalent or similar to that paid to employees of the U.S. Postal Service, United Parcel Service, or Federal Express.

12. During early morning work hours, many Central Mail Bureau employees and supervisors work together sorting mail. During this daily morning period, many topics of interests are discussed. As noted in Finding of Fact No. 7, the topic of privatization was frequently discussed during these morning mail sorting sessions.

Beginning in January 1995, much discussion took place within the Central Mail Bureau concerning the progress of the

collective bargaining sessions and the strike votes. Tension had risen among the employees because of the pending contract talks and the opposition to a work stoppage expressed by some of the affected employees.

13. Witness Larry Higgins, Mail Clerk Floor Supervisor, is a former U.S. Postal Service worker. Sometime in January 1995, Mr. Higgins commented on a certain newspaper article during a usual morning mail sorting session. The newspaper article concerned a U.S. Postal Service worker in another state who shot his supervisor at the work site. In a humorous fashion, Mr. Higgins suggested that William T. Spurzem (because he was the supervisor) should get a bullet-proof vest. Other Central Mail Bureau employees, including John H. Morgan, were present and had opportunity to witness the conversation.

14. Sometime in early April 1995 (prior to the strike by the Central Mail Bureau employees), William T. Spurzem made a comment to Mickey Street, Mail Clerk Supervisor, Department of Public Health and Human Services, while delivering mail to Mr. Street's place of work. The comment related to the possibility of the privatization of the Central Mail Bureau should the employees strike. The exact phrase spoken by Mr. Spurzem is not clear. Only Mr. Street and Mr. Spurzem were present at the time and Mr. Street testified at the hearing and at his deposition that he believed Mr. Spurzem was joking or just letting off

steam. Mr. Street is not an employee of the Central Mail Bureau nor a member of the Complainant's labor organization.

15. William T. Spurzem is not a member of Defendant's negotiating team and did not attend any negotiating sessions between Complainant and Defendant.

#### **IV. CONCLUSIONS OF LAW**

1. The Board of Personnel Appeals has jurisdiction over this unfair labor practice charge by a labor organization against a public employer. Section 39-31-405, MCA.

2. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using federal court and National Labor Relations Board (NLRB) precedence as guidelines interpreting the Montana Collective Bargaining for Public Employees Act as the State Act is so similar to the Federal Labor Management Relations Act. **State ex rel Board of Personnel Appeals v. District Court**, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); **Teamsters Local No. 45 v. State ex rel Board of Personnel Appeals**, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); **City of Great Falls v. Young (III)**, 211 Mont. 13, 686 P.2d 185, 119 LRRM 2682.

3. A leading United States Supreme Court case on the issue of free speech versus threatening speech that results in an unfair labor practice is **NLRB v. Gissel Packing Co.**, 395 U.S. 575, 71 LRRM 2481 (1969). The case sets the standard that



employer predictions are protected free speech, but threats are not protected by the First Amendment. To be "predictions" the utterance must have some objective basis in fact. In Gissel, supra, the Court found that the employer had committed an unfair labor practice by giving speeches, handing out pamphlets, leaflets and letters that stated the company was in such precarious financial condition that it would have to shut down if the employees' unreasonable demands were met, as other unionized plants in the areas had done. There was no factual basis for the employer's predictions. The Court in Gissel states:

...we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board...expression of "any views, argument of opinion" shall not be "evidence of an unfair labor practice," so long as expression contains "no threat of reprisal or force or promise of benefit....Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit". He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. 71 LRRM 2497

As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control" and not "threats of economic reprisal to be taken on his own volition." 71 LRRM 2497

In applying the Gissel criteria, the NLRB found in M.K. Morse Co. and United Steelworkers, AFL-CIO, 302 NLRB 147, 138 LRRM 1245 (1991) that the employer had crossed the protected free speech line by promising different benefits to employees who voted against the union; by telling employees that they would be fired for specific union activities, and for telling employees that remarks they made concerning promised wage increases caused their firing. Conversely, the Board in M.K. Morse, supra, also ruled that the employer's statements that two union supporters were liars and the company Vice President's comment that "you don't know what a good screwing is" in reference to a union election was not an unspecified threat of reprisal if the union won the election, but rather a comment made in the middle of a bawdy conversation that employees were participating in with the Vice President. The former two statements were protected by the First Amendment and were found to be non-threatening statements. Gissel, 138 LRRM at 1247. In Benjamin Coal Co. v. Mine Workers, 294 NLRB 44, 133 LRRM 1058 (1989), the Board, among other First Amendment issues, decided that the company's pre-election written materials that suggested

the possibility of plant closure, and dire economic consequences as a possibility of unionization, were protected as the company's economic outlook was bad.

There is no dispute a real possibility exists that the Central Mail Bureau may be privatized at some point. Privatization is a strong element on the Governor's agenda and all State agencies have been instructed to review the services they provide.

There is also no dispute that privatization of the Central Mail Bureau has long been discussed among the employees and supervisors. Legislative Committee members have toured the facility exploring the possibility of privatization. Administrator Debra Fulton has testified before Legislative Committee(s) concerning privatization and a local business has presented a "bid" to handle the State's mail system.

The record indicates the possibility of privatization is viewed differently by Central Mail Bureau employees. Some view privatization as a threat to continued employment; others view it as an opportunity for higher pay. Regardless of individual views, the record shows both employees and supervisors have thoroughly discussed the possibility, probability, disadvantages, and advantages of privatization.

In this instant matter, Complainant alleges that soon after the strike vote, Central Mail Bureau Supervisor William T.

Spurzem let it be known to Union members Dennis McAlpin and John Morgan that if the employees participated in a strike, management would hire a private contractor to deliver the mail and the employees would lose their jobs. Complainant also alleges that Mr. Spurzem also made a similar statement to Mickey Street employed by a different State agency. Privatization is a real concern and has been a primary topic of discussion for more than five years. It is understandable that Mr. Spurzem, or others, could have, and may have, voiced an opinion predicting a work stoppage could add to the arguments in favor of privatization of the Central Mail Bureau and that the State might privatize the mail service if the cost of providing the service increased to the point where it would make good business sense to hire a contractor to deliver the mail. Although Mr. Spurzem would have no control as to whether the Central Mail Bureau would be privatized, there is a factual basis for the prediction of privatization. The possibility of the privatization of the Central Mail Bureau existed long before a strike vote was taken or the work stoppage commenced. Mr. Spurzem's alleged comments can only be interpreted as "predictions" as defined in Gissel, supra.

The record shows that the allegation that Mr. Spurzem suggested that John Morgan should get a bullet-proof vest was a misunderstanding. Larry Higgins, the former U.S. Postal Service

worker, reported on a newspaper article during the usual morning mail sorting period. The article concerned the shooting of a supervisor in a U.S. Post Office in another state. The bullet-proof vest comment resulted from the intended humorous banter between Mr. Higgins and Mr. Spurzem and was misunderstood by Mr. Morgan.

4. Complainant has not violated Section 39-31-401(1), (3), and (5), MCA.

**V. RECOMMENDED ORDER**

IT IS ORDERED, Unfair Labor Practice Charge No. 75-95 is DISMISSED.

DATED this \_\_\_\_ day of January, 1996.

BOARD OF PERSONNEL APPEALS

By:

STAN GERKE  
Hearing Officer

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than \_\_\_\_\_. This time period includes the 20 days provided for in ARM 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals  
Department of Labor and Industry  
P.O. Box 6518  
Helena, MT 59604

\* \* \* \* \*

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day, served upon the following parties or such parties' attorneys of record by means of the State of Montana's Deadhead mail service.

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P.O. Box 200110  
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DATED this \_\_\_\_\_ day of January, 1996.